PENGURUSAN PROJEK DAYA SDN BHD & ANOR A

v.

KONSORTIUM LAPANGAN TERJAYA BHD

HIGH COURT MALAYA, KUALA LUMPUR B
HASNAH MOHAMMED HASHIM JC
[SUIT NO: D22-1981-2002]
9 MARCH 2011

CONTRACT: *Oral agreement - Existence of oral agreement - Whether plaintiffs to prove - Whether there was specific evidence on where and when oral agreement entered - Whether plaintiffs called parties who agreed to terms of oral agreement as witness - Whether there was evidence of terms of oral agreement - Whether privity of contract existed* C

CONTRACT: *Construction of terms of contract - Conditional contract - Plaintiffs' appointment as project manager and engineering consultant - Whether this was subject to signing of appropriate agreements - Whether appropriate contract agreements were executed - Whether plaintiffs' appointment letter stipulated such condition - Whether plaintiffs accepted such condition - Whether defendant enjoyed benefits of work done by plaintiffs* D E

CONTRACT: *Damages - Loss of profit - Whether oral agreement existed between plaintiffs and defendant - Whether privity of contract existed - Plaintiffs' appointment as project manager and engineering consultant - Whether this was subject to signing of appropriate agreements - Whether appropriate contract agreements were executed - Whether defendant enjoyed benefits of work done by plaintiffs* F

The defendant, a consortium consisting of four companies, G
submitted a proposal for the privatisation of the construction of a highway linking Kuala Lumpur to the Kuala Lumpur International Airport ('the project'). The plaintiffs contended that there was an oral agreement, between them and the defendant in 1995, for the purpose of submitting the proposal to the government. The H
defendant had also made a written offer dated 17 July 1996 ('appointment letter'), appointing the plaintiffs as the project manager and the engineering consultant to which they accepted. The defendant claimed it never entered into any agreement with the plaintiffs and that all its correspondence was made to I

Kumpulan Pengurusan Daya ('KPD') through the group chief executive, Ravi. It contended that the appointment letter to KPD was subject to the signing of appropriate contract agreements but these were never executed subsequently, it decided to cease negotiations with KPD and no longer required the plaintiffs' service. The plaintiffs brought this claim against the defendant for *inter alia* the loss of profit in the preparation of the proposal. The issues to be determined were: (i) whether there was an oral agreement between the defendant and the plaintiffs; and (ii) whether the appointment letter was subject to the signing of appropriate contract agreements and whether these were executed.

Held (dismissing the application with costs):

(1) The burden of proving the oral agreement was essentially a question of fact. It was on the plaintiffs to call all the individuals to support the contention of the existence of the oral agreement. The findings based on the evidence *ie*, that: (i) there was no specific evidence of where and when the oral agreement was entered into; (ii) the plaintiffs did not call the parties who alleged to have agreed to the terms of the oral agreement; (iii) there was no evidence as to who made the offer and who accepted the offer; (iv) there was no evidence of the terms of the oral agreement; and (v) the fact that the appointment letter and a letter written by KPD to the defendant did not refer to the oral agreement was that no such oral agreement existed between the plaintiffs and the defendant. (paras 46, 47 & 48)

(2) The testimony of the plaintiffs' director was that the oral agreement was made in September 1995 however, the defendant, was only incorporated in June 1996. It was clear that there was no privity of contract between the plaintiffs and the defendant. (para 49)

(3) The appointment letter stipulates that that the plaintiffs' appointment was subject to the appropriate contract agreement to be signed by the parties and this condition was accepted by the plaintiffs. It was clear, from the correspondences between the parties, the conduct of the parties and the evidence adduced, that the parties were still negotiating the terms of the appointment of the plaintiffs. (paras 61 & 63)

(4) There was no evidence to show that the defendant had enjoyed the benefit of the work purportedly done by the plaintiffs. The defendant did not proceed to construct the highway based on the preliminary drawings and specifications provided by the plaintiffs. (para 65)

Case(s) referred to:

Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 SC ***(refd)***

Crossley v. Maycock [1874] 43 LJ 379 ***(refd)***

International Times & Ors v. Leong Ho Yuen [1980] 1 LNS 31 FC ***(refd)***

Kheamhuat Holdings Sdn Bhd v. The Indian Association, Penang [2006] 2 CLJ 1040 CA ***(refd)***

Sang Lee Company Sdn Bhd v. Suburamaniam Mayawan & Ors [2011] 1 CLJ 167 CA ***(refd)***

For the plaintiff/appellant - M/s C Leo Camoens
For the defendant/respondent - M/s Thomas Philip

Reported by Melinda Robert

JUDGMENT

Hasnah Mohammed Hashim JC:

Brief Facts

[1] In June 1995 the Economic Planning Unit (EPU) in the Prime Minister's Department invited on a closed tender basis five companies, namely Gamuda Bhd., Road Builder (M) Holding Bhd., UEM, MMC and Maxtro Engineering to submit a proposal for the privatisation of the Dedicated Highway linking Kuala Lumpur (KL) to the Kuala Lumpur International Airport (KLIA). The proposed Dedicated Highway will consist of 45km of dual 3 lanes expressway linking KL to KLIA at Sepang *via* Putrajaya.

[2] On or about the same time the Daya Group of Companies (DAYA) or Kumpulan Pengurusan Daya (KPD) approached Anson Perdana Bhd. (Anson) to form a Consortium with other parties to submit the proposal for the privatisation of the said highway to the EPU. Anson then invited Seal Incorporated who subsequently invited Lembaga Urusan Tabung Haji (LUTH) to be a member of the Consortium.

[3] Sometime in September 1995 LUTH requested permission from EPU to participate in the tender and by a letter dated 16 September 1995 the EPU informed LUTH that the Government had agreed to allow LUTH to participate in the tender and to submit the proposal by 30 September 1995.

[4] By a letter dated 30 September 1995 the aforesaid Consortium now known as Konsortium Lapangan Terjaya (KLT) comprising of LUTH, Anson and Seal together with KPD submitted the proposal to the EPU. The Letter of Intent (LOI) was issued by the Government to the defendant on or around 16 April 1996.

Plaintiffs' Case

[5] The plaintiffs contend that in or around June 1995 the Government of Malaysia ("the Government") had invited tenders for the privatization of the construction of the dedicated highway linking Kampong Pandan, Kuala Lumpur to the Kuala Lumpur International Airport (KLIA) at Sepang *via* Putrajaya ("the project"). According to the plaintiffs KPD had approached Anson to form the Consortium with other parties to submit the proposal. Subsequently Anson invited Seal Incorporated Bhd. and also Lembaga Tabung Haji (LUTH) to form the Consortium for the purpose of submission of the privatization proposal to the Government for its consideration.

[6] The plaintiffs further contend that the plaintiffs and the defendant had entered into an oral agreement in September 1995 based on the following terms:

a) that the plaintiffs would carry out all the works necessary for the preparation of the privatization proposal.

b) that in the event that the bid was successful:

   i. the 1st plaintiff would be appointed and retained as Independent Managers for the duration of the privatization project with an agreed fee of 4% of the construction costs;

   ii. the 2nd plaintiff would be appointed and retained as Engineering Design Consultant for the duration of the privatization project on Scale of Fees as stipulated by the Board of Engineers; and

c) The bid would be deemed successful upon receipt of a LOI from the Government.

[7] By a letter dated 17 July 1996 the defendant made a written offer to the plaintiffs as follows:

i. that the 1st plaintiff is appointed as an Independent Project Manager with the agreed project management fees of 4% of the total construction costs; and

ii. the 2nd plaintiff is appointed as Engineering Design Consultant with an agreed engineering fee of 4% of the total construction costs.

[8] According to the plaintiffs this offer was accepted. However by a letter dated 6 December 1996 the defendant notified the plaintiffs that it no longer wishes to continue with the services of the plaintiffs.

[9] The plaintiffs filed this claim against the defendant for loss of profit of RM14,633,196, being monies expended in the preparation of the proposal and damages.

The Defendant's Case

[10] The defendant is a Consortium consisting of four companies, LUTH, Anson, Seal Incorporated Bhd. (Seal) and Hi-Summit Construction Sdn. Bhd. and was formally incorporated in June 1996. The defendant contends that the plaintiffs and the defendant never entered into any form of oral agreement as in September 1995 the defendant had not been incorporated yet.

[11] The defendant further contends that they had always liaised with KPD in particular with one Ravi Dharan who was KPD's Group Chief Executive. Therefore according to the defendant no privity of contract exists between the defendant and the plaintiffs.

[12] The letter dated 17 July 1996 from the defendant to KPD was subject to the signing of appropriate agreements and the appropriate agreements were never executed. On 6 December 1996 the defendant decided to cease negotiations with KPD and decided that it no longer required the services of the plaintiffs.

[13] Issues To Be Determined

i. Whether in September 1995 for the purpose of submitting a proposal to the Government on the Privatisation Project there was an oral agreement between the plaintiffs and the defendant that the work done by the plaintiffs would be carried out on a 'success bid' basis in the terms as pleaded.

A ii. Whether the letter dated 17 July 1996 was subject to the signing of appropriate agreements and whether the appropriate agreements were executed.

Findings And Evaluation

B *i. Whether In September 1995 For The Purpose Of Submitting A Proposal To The Government On The Privatisation Project There Was An Oral Agreement Between The Plaintiffs And The Defendant That The Work Done By The Plaintiffs Would Be Carried Out On A 'Success Bid' Basis In The Terms As Pleaded*

C **[14]** The plaintiffs contend that in or around September 1995 an oral agreement was reached between the plaintiffs and the defendant that the works carried out by the plaintiffs in preparing the privatization proposal would be on a Success Bid Basis (para. D 5 of the statement of claim). It is therefore incumbent upon this court to consider the surrounding facts and circumstances together with the documentary evidence to ascertain whether the parties had conducted themselves in such manner that it may be inferred that such an oral agreement did in fact subsist, or that it did not.

E **[15]** The project in this case was one of many constructions of highway projects that were privatised by the Government. The Project consists of 45km of dual 3 lanes expressway linking Kuala Lumpur to KLIA at Sepang *via* Putrajaya and was tendered by F the Government on a closed tender basis sometime in June 1995. Initially the Consortium was not invited to participate in the Tender Bid. However KPD approached LUTH through the office of Seal to request the Government to extend an invitation to a consortium led by LUTH.

G **[16]** By a letter dated 13 September 1995 (P1) the Managing Director of LUTH, Dato Haji Abdul Latif bin Haji Mohd Hassan wrote to the Director General (EPU) informing of their interest to participate in the tender:

H > 2. Bagi pihak Lembaga Urusan dan Tabung Haji, saya mengambil kesempatan ini terlebih dahulu mengucapkan setinggi-tinggi terima kasih kerana memberi pertimbangan membolehkan Lembaga Tabung Haji mengemukakan cadangan penyertaan dalam projek tersebut. Walaupun saya telah dimaklumkan tarikh penutupan ialah I pada 30 September 1995, InsyaAllah, cadangan dari Lembaga Tabung Haji ini akan dapat dikemukakan dalam jangkamasa tersebut.

[17] For the purpose of the participation in the tender LUTH also informed the EPU that LUTH will set up a Consortium: A

> 3. Lembaga Tabung Haji akan menubuhkan rakan kongsi dalam bentuk consortium yang terdiri dari syarikat-syarikat tersenarai di papan Bursa Saham Kuala Lumpur serta syarikat pembinaan bumiputra yang kukuh. B

[18] It is noted that in that letter LUTH did not mention any specific company.

[19] The plaintiffs had only one witness, Tan Hak Sieu (PW1) who is the director of the plaintiffs. PW1 has been a director of the 1st plaintiff since May 1995 and a director of 2nd plaintiff since 1988. C

[20] PW1 in his witness statement had said that he was informed of the Government's plan to build the highway linking Kuala Lumpur to KLIA *via* Putrajaya. He said that in June 1995 tenders were open for invited bidders for the construction of the highway. The plaintiffs were interested in the project and approached Anson who then invited Seal and then LUTH and Hi Summit Sdn. Bhd. to form a Consortium to bid for the Project. D E

[21] According to the plaintiffs the defendant agreed on the roles each company would play in the preparation of the Tender Bid. According to the plaintiffs they had prepared the Technical Proposal, the Financial Proposal and the Engineering Drawings for the Tender Bid. The 1st plaintiff is the 'Project Manager' and the 2nd plaintiff, the 'Engineering Consultant'. F

[22] According to PW1 in his answer to Q7 of his witness statement: G

> The 3 parties who formed the Defendant that is Anson Perdana Bhd, Seal Incorporated Bhd and LUTH requested the Plaintiffs to prepare the privatisation proposal to enable the Defendant to submit the tender.
>
> The persons who made the request were Mr. Soo Tian Chai of Anson Perdana, Mr. Lee Aik Chong of Seal incorporated Bhd and the Pengarah Besar LUTH, Dato Hj. Abdul Latif bin Hj. Mohd. Hassan. H

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[23] PW1 said in his answer to Q8 of his witness statement that in September 1995 there was an oral agreement between the plaintiffs and the defendant that the work done by the plaintiffs for the defendant would be carried out on a 'Success Bid' Basis and according to him Mr. Soo Tian Chai of Anson, Mr. Lee Aik Chong of Seal incorporated Bhd and the Pengarah Besar LUTH, Dato Hj. Abdul Latif bin Hj. Mohd. Hassan had agreed to the arrangement:

> Q8: Was there an agreement on how the Plaintiffs would be paid?
>
> A: In September 1995 there was an oral agreement between the Plaintiffs and the Defendant that the work done by the Plaintiffs for the Defendant would be carried out on a 'Success Bid' Basis.
>
> Q9: Who in the Defendant agreed to this?
>
> A: Mr. Soo Tian Chia of Anson Perdana Bhd., Mr. Lee Aik Chong of Seal Incorporated Bhd. and Pengarah Besar LUTH, Dato Haji Abdul Latiff bin Hj. Mohd. Hassan.

(PW1's witness statement dated 10 August 2010).

[24] In PW1's witness statement (Supplementary no. 1) he admitted that there was no written agreement but that there was an oral agreement between the parties:

> Q3: Was there a written agreement between the Plaintiffs and the Defendant about the functions of the Plaintiffs in the highway project?
>
> A: No. There was an oral agreement between the Plaintiffs and the Defendant in September 1995. The proof of this is in the Defendant's own document.

[25] No other witness was called by the plaintiffs to support PW1's contention that the proof of the existence of the oral agreement can be found in the documents. Numerous documents were tendered and shown to the court. None of the documents which were tendered show that there was an oral agreement as contended by PW1. PW1 referred to all the technical proposal documents which had described the 1st plaintiff as "Project Managers" and the 2nd plaintiff as "Engineering Consultants" as proof that there was an oral agreement between the parties. He

also referred to the drawings and contended that the references to the plaintiffs in all those documents show that there was in fact an oral agreement between the parties.

[26] PW1 referred to the document at pp. 36-58 (P7) of the bundle A1 and the letter of appointment dated 17 July 1996 (P8) at pp. 59-60 of the same bundle.

[27] P7 is a letter dated 11 June 1996 which was written by the Group Chief Executive of KPD himself. The Group Chief Executive of KPD did not mention at all in P7 of any oral agreements, or of discussions between the parties pertaining to the appointments of the plaintiffs to carry out the works on a Success Bid Basis. Furthermore it is observed that the letter is not from either the 1st plaintiff or the 2nd plaintiff:

> Kumpulan Perunding Daya Sdn. Bhd. (KPD) the development consultant for the Dedicated Highway Proposal had on a success bid basis prepared the bid for Konsortium Lapangan Terjaya (KLT) to submit to the Government.

[28] In the same letter it is also mentioned that it was KPD that had appointed local and foreign consultants. He also specifically mentioned in para. 2 at p. 37 of P7 that:

> The cost for the services for the various professional firms were borne by Kumpulan Daya Sdn. Bhd.

[29] P8 is a letter dated 17 July 1996 from the defendant to KPD offering the appointments of the plaintiffs based on the proposed scope of work as specified in KPD's submission dated 11 June 1996. Paragraph 3 of P8 reads as follows:

> The above appointments shall be subject to the signing of appropriate contract agreements.

[30] PW1 in his evidence said that the proof of the existence of the oral agreement is reflected in the documents in particular P7 and P8. However both the documents make no mention of the oral agreement. Both P7 and P8 were letters issued after the LOI was issued by the Government and after the defendant was formally incorporated.

[31] Ravi Dharan who was the Group Chief Executive of the Daya Group or KPD, was the signatory and the writer of P7. However he was not even called by the plaintiff to testify.

A According to PW1 attempts were made by the plaintiffs to call Ravi Dharan. In his answer to Q5 in his Second Supplementary Witness Statement he said that,

> Q5. Have you made efforts to locate him?
>
> B A: Yes several times over the past years in relation to this case. I have been to his parents' house which was the address he gave us for all correspondence and even sent my staff to contact him but I have been unsuccessful. Each time my staff and I were told he was overseas or not available. His parents are dead now and C his sister lives in their house. She told me she does not know where he lives because they are not on talking terms.
>
> Throughout the time our company was sued by Maybank and before our building was auctioned off I tried to contact him but failed. The company staff who went to deliver the letters were told D not do so as he does not live there.
>
> I do not know where he lives and my company staff has also not been able to locate his current address. He has not contacted the company or me for the last seven years.

E **[32]** I find the evidence given by the PW1 highly improbable and unbelievable. Firstly, PW1's claim that he has not been able to contact Ravi Dharan for the last seven years seems a bit difficult to accept as Ravi Dharan is the director of the plaintiffs. No documentary evidence of any letters or notices given by the F plaintiffs to Ravi Dharan notifying him of the hearing and of him giving evidence in court in relation to this suit was adduced by the plaintiffs to prove and show that the plaintiffs had seriously attempted to contact or trace Ravi Dharan. The staff of the plaintiffs allegedly who went to Ravi Dharan's house was not G called to give evidence to support PW1's contention that attempts were actually made. Furthermore, the statement made by PW1 that Ravi Dhahran's sister had told him that she does not know where Ravi Dharan and the staff who delivered the letters and were told that Ravi Dharan does not live at that address are H merely hearsay evidence as the sister and the staff concerned were not called to give evidence. The plaintiffs therefore failed to show any reasonable efforts of contacting, locating and calling Ravi Dharan as a witness. The plaintiffs also had the option to *subpoena* Ravi Dharan and this was not done.

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[33] PW1 said that he played the major role of preparing all the documents for the proposal and that Ravi Dharan was merely involved in promoting the highway project. However based the documentary evidence adduced by the plaintiffs Ravi Dharan played a very active and pivotal role. 99% of the letters adduced by the plaintiffs are letters signed by Ravi Dharan himself as Group Chief Executive of Kumpulan Daya Perunding Bhd. No letters were signed by PW1. However PW1 said he had drafted all those letters signed by Ravi Dharan. However no evidence was adduced to support PW1's assertion that he had drafted all those letters.

[34] When asked in Q7 in his Second Supplementary Witness Statement whether it would be possible to call Ravi Dharan as a witness in this case PW1 said:

> I do not think so. It would cause this case to be delayed further and would be a great waste of effort.

[35] Ravi Dharan would have been able to shed some light as to the existence of the oral agreement as he was the one that had approached Anson. It would not be a great waste of effort if the plaintiffs had seriously taken steps to call Ravi Dharan as a witness to support the evidence of PW1. This statement by PW1 shows that it is highly probable that no efforts were made by the plaintiffs to contact, called and to secure Ravi Dharan's attendance in court as they said they had done so in PW1's answer to Question 5 in his Second Supplementary Witness Statement as stated above.

[36] DW1, Madam Lim Chew Yin was appointed to the Board of Directors of the Defendant in July 1996. She was also a director of Anson Perdana Bhd. Anson was a shareholder of the defendant. In her witness statement she said that the defendant did not deal with either the 1st plaintiff or the 2nd plaintiff. They dealt with Ravi Dharan and in fact it was through Ravi Dharan that the defendant came to know of the plaintiffs. In DW1 witness statement she had stated that it was Ravi Dharan that had initiated and promoted the project. It is therefore strange that Ravi Dharan is disinterested in this claim against the defendant as both the oral and documentary evidence show that he had played a pivotal role in the arrangement from the beginning until the end where he mysteriously disappeared.

[37] With regards to the existence of the oral agreement DW1 said that there was no such oral agreement with the defendant as the defendant was only incorporated on 8 June 1996. During cross examination DW1 explained that Anson was invited as a partner to submit the proposal of the project. The entity preparing the proposal was a loose entity comprising of Anson, Seal, LUTH, together with Hi Summit and was initiated by Daya:

> We were approached by Mr. Ravi … Yes he approached Mr. Su … On occasion I was present when they met …
>
> Q: When were you involved in 1995 you were with Anson … who gave you instructions?
>
> A: My boss Su Tian Chia and Anson's Board of Directors. We go in together to submit the privatisation proposal together with the group … nothing solid … not the project *per se*.

[38] DW1 also testified that she was never informed of any oral agreement between Anson and the plaintiffs. The defendant submitted the tender proposal and all members of the consortium were involved with the preparation of the proposal. DW1 gave evidence that she herself gave input in respect of the financial aspect of the proposal. She was directly involved in the discussion with Daya as to the preparation of the proposal. This court has no reason not to believe DW1. She gave consistent evidence and I found her to be a credible witness.

[39] DW2, Dato Alan Ong Tee Thong is a director of the defendant and was appointed on 14 October 1996. He admitted during cross examination that he was appointed after the LOI was issued. However he was familiar with the project and the matters relating to KPD and the plaintiffs. In DW2's witness statement he said that the defendant had only dealt with Ravi Dharan who was the key promoter of the highway project. The privatisation proposal was merely a proposal which did not carry any contractual commitment to any parties. Parties took a financial risk when they prepared the Tender Bid as there was no guarantee that they would be the company selected by the Government to undertake the project. KPD in many of their correspondence and PW1 had stated that DAYA had undertaken the preparation of the Tender Bid based on a Success Bid Basis. The project is deemed to be successful when the LOI was issued by the EPU to the successful company.

[40] PW1 had also testified that he had prepared the draft agreements (P65 and P65A) and sent it to the defendant after P8 was issued and signed. DW2 explained in his witness statement that in September 1996 the draft agreements were forwarded by Ravi Dhahran to the defendant for consideration. The defendant's solicitors were of the view that the draft agreements were heavily one-sided in favour of the plaintiff. The draft agreements were never finalised or formalized by the parties as there were terms which the parties could not agree upon.

[41] No evidence was adduced by the plaintiffs that there was an oral agreement between the parties. PW1 testified that the oral agreement was made between the parties and he relied on numerous correspondence and technical documents. However the correspondences such as P7 and P8 make no reference to any oral agreement between the parties.

[42] No proof of efforts or attempt was made by the plaintiffs to call Ravi Dharan to give evidence to support PW1's assertion as to the existence of the oral agreement. In fact PW1 gave evidence that it would be a waste of time and would cause the case to be delayed further. All the correspondences tendered by the plaintiffs points to Ravi Dharan as being the key player in the proposal of the Project and it would not have been a waste of efforts at all. Especially so since he was also a director of the 1st plaintiff and the Group Chief Executive of KPD.

[43] According to the plaintiffs the oral agreement was made in 1995. However, at that point of time the defendant was not incorporated yet. The parties namely Anson, Seal and LUTH together with KPD had decided to work together for the purposes of submission of the proposal of the privatization of the dedicated highway. It was as DW1 said in her evidence "... a loose entity". The privatization proposal was merely a proposal which did not carry any contractual obligations to any of the members of the Consortium and KPD. It was a business proposal made by the Consortium to the Government. In fact each of the company involved in the Consortium took a business risk when they participated. If the Government accepted the proposal then all the efforts made would have been worth it. However if the Government did not accept the proposal then the party submitting the proposal would have to bear the cost of

preparation of the proposal documents. In the instant case the Government had accepted the proposal by the Consortium but the terms were still subject to further negotiations as stated in the LOI (P6):

> ... bahawa Kerajaan telah bersetuju secara prinsip untuk menswastakan pembinaan dan pengendalian Lebuhraya Khusus Dari Kuala Lumpur Ke KLIA, Sepang kepada Konsortium Lapangan Terjaya tertakluk kepada rundingan ke atas syarat dan terma penswataan dan perjanjian mengenainya ditandatangani di antara Kerajaan dengan Konsortium.

[44] P7 is a letter from KPD not the plaintiffs to the defendant. There is no reference whatsoever to any oral agreement between the plaintiffs and the defendant. The letter states that KPD was the development consultant for the dedicated highway proposal and KPD had on a success basis prepared the bid for the Consortium. According to the plaintiffs upon the receipt of the LOI the bid is deemed to be successful. However no evidence was adduced by the plaintiffs to prove this contention. Plaintiff did not call any of the persons that he had named as being directly involved in the oral agreement. Furthermore all the correspondences to the defendant with regard to that proposal was made by KPD and not the plaintiffs.

[45] The Court of Appeal in the case of *Sang Lee Company Sdn. Bhd. v. Suburamaniam Mayawan & Ors* [2011] 1 CLJ 167 Justice Low Hop Bing (JCA) said that:

> The plaintiffs who desire the court to give judgment as to their right or liability, dependent on the facts which they assert in relation to the oral contract bear the burden of proving on a balance of probabilities that they have an oral contract which is binding on the defendant. Section 101(1) and (2) of the Evidence Act 1950 merit reproduction as follows:
>
> **101 Burden of proof**
>
> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[46] It is the plaintiffs' burden to call all the individuals to support the contention of the existence of an oral agreement. The question of adverse inference against the defendant does not arise at all as it the plaintiffs that have to prove the existence of the facts which they assert in relation to the oral agreement. Any adverse inference would be against the plaintiffs for their failure in calling Ravi Dharan and the other individuals who they alleged had entered into the oral agreement. His Lordship Salleh Abas FJ in *International Times & Ors v. Leong Ho Yuen* [1980] 1 LNS 31 said that:

> For the purpose of this appeal it is necessary to bear in mind the distinction between the two senses in which the expressions burden of proof and onus of proof are used (*Nanji & Co. v. Jatashankar Dossa & Ors.* AIR [1961] SC 1474, 1478 and *Raghavamma v. Chenchamma* AIR [1964] SC 136, 143). The first sense, signified by the expression burden of proof such as referred to in s. 101 of the Evidence Act is the burden of establishing a case and this rests throughout the trial on the party who asserts the affirmative of the issue. The appellants in the present appeal relied on justification and fair comment. Therefore, the burden of proving these defences rests entirely upon them (*Gatley on Libel and Slander*, 7th edn. paras. 351 and 354). The second sense referred to as onus of proof, on the other hand, relates to the responsibility of adducing evidence in order to discharge the burden of proof. The onus as opposed to burden is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to ss. 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail. It is this onus that we are concerned with in the present appeal.

[47] The question of the oral agreement is essentially a question of fact and the burden of proving rests entirely upon the plaintiffs. PW1 was the only witness for the plaintiffs. PW1 failed to provide any evidence of the terms of the oral agreement. The plaintiffs did not take any effort to protect their interest since they would have known that such a tender would involve substantial cost.

[48] Further the contemporaneous documentary evidence does not suggest the existence of such an agreement. It is my finding based on the evidence no such oral agreement existed between the plaintiffs and the defendant:

A i. No specific evidence of where and when the oral agreement was entered into;

ii. The parties alleged to have agreed to the terms were not called by the plaintiffs to give evidence, in particular Mr. Ravi
B Dharan;

iii. No evidence as to who made the offer and who accepted the offer;

iv. No evidence as to the terms of the oral agreement; and
C

v. Neither P7 nor P8 referred to any oral agreement.

[49] The testimony of PW1 is that the oral agreement was made with the defendant sometime in September 1995. However based
D on the documentary evidence adduced the defendant was only incorporated in June 1996. Clearly there is no privity of contract between the plaintiffs and the defendant.

[50] The doctrine of privity of contract states that a person may not enforce a contractual promise and obtain remedies for its
E breach, even when the promise was expressly made for that person's benefit, if he is not a party to the contract. Thus, persons who are not a party to a contract may not have their rights diminished by that contract.

F *ii. The Letter Dated 17 July 1996 Was Subject To The Signing Of Appropriate Agreements*

[51] The existence of an agreement depends on the intention of the parties, who must be *ad idem*. This is inferred from the
G language used, the conduct of the parties having regard to the surrounding circumstances of the contract. However when an arrangement is made subject to contract it will mean that the parties are still negotiating.

[52] Edgar Joseph Jr. SCJ in *Ayer Hitam Tin Dredging Malaysia*
H *Bhd. v. Y.C. Chin Enterprises Sdn. Bhd.* [1994] 3 CLJ 133 said:

> As clear and helpful an enunciation of the principles as any which should guide the Court in determining the ever recurring question of whether there has been a contract between the parties is
I provided by Saville J in *Vitol B.V. v. Compagnie Europeene des Petroles* [1988] 1 Lloyd's Rep. 574, at 576 in the following words:

> The approach of the English law to questions of the true construction of contracts of this kind is to seek objectively to ascertain the intentions of the parties from the words which they have chosen to use. If those words are clear and admit of only one sensible meaning, then that is the meaning to be ascribed to them – and that meaning is taken to represent what the parties intended. If the words are not so clear and admit of more than one sensible meaning, then the ambiguity may be resolved by looking at the aim and genesis of the agreement, choosing the meaning which seems to make the most sense in the context of the contract and its surrounding circumstances as a whole. In some cases, of course, having attempted this exercise, it may simply remain impossible to give the words any sensible meaning at all in which case they (or some of them) are either ignored, that is to say, treated as not forming part of the contract at all, or (if of apparent central importance) treated as demonstrating that the parties never made an agreement at all, that is to say, had never truly agreed upon the vital terms of their bargain.

[53] The existence of an agreement depends upon the intention of the parties. The parties must be *ad idem* or there must be a consensus between them. The LOI (P6) was issued by the EPU to the defendant on 16 April 1996 states as follows:

> ... sukacita dimaklumkan bahawa Kerajaan telah bersetuju secara prinsip untuk menswastakan pembinaan dan pengendalian Lebuhraya Khusus Dari Kuala Lumpur ke KLIA, Sepang kepada Konsortium Lapangan Terjaya tertakluk kepada rundingan ke atas syarat dan terma penswastaan dan perjanjian mengenainya ditandatangani di antara Kerajaan dengan Konsortium.

[54] *Vide* a letter dated 11 June 1996 (P7) from the Ravi Dharan the Group Chief Executive of KPD wrote to the defendant requesting for payment for professional services:

> Kumpulan Perunding Daya Sdn. Bhd (KPD) the development consultant for the Dedicated Highway proposal had on a success bid basis prepared the bid for Konsortium Lapangan Terjaya (KLT) to submit to the Government. The scope of work for the success bid was from the collection of Tender Document from EPU to the receipt of the Letter of Intent (LOI) from the government for the privatization of the Dedicated Highway. Upon receipt of the LOI the bid is successful.
>
> During the preparation of the Tender bid KPD utilized the services of Pengurusan Projek Daya Sdn. Bhd. on an Independent Project Management concept to conceive a proposal on a fast track basis it also engaged Jurutera Perunding Daya Sdn. Bhd. as the Engineering Consultant.

[55] The defendant responded by a letter dated 17 July 1996 (P8):

> We refer to the discussion between your goodself and the EXCO committee of the Company on 15.7.1996 and we are pleased to offer you the following appointments based on the proposed scope of work as specified in your submission of 11.6.1996 …
>
> The above appointments shall be subject to the signing of the appropriate contract agreement.

[56] The offer was accepted by the plaintiffs and the parties proceeded to discuss the draft agreements. The draft agreements were given to the defendant *vide* a letter dated 25 September 1996 (P65). The defendant's solicitors vetted the agreement and was of the view that it was one sided in favour of the plaintiffs and suggested some changes. The parties could not agree on some terms of the draft agreements. Subsequently the defendant issued a letter to the 1st plaintiff dated 6 December 1996 (P66) that the Consortium after much deliberation decided not to continue with the services of the 1st plaintiff:

> We refer to your conditional appointment, expressed in our letter dated 17 July 1996, as the project management company in respect of the Kuala Lumpur - Putrajaya - KLIA "Dedicated Highway" project which appointment is subject to the execution of the appropriate contract agreement between ourselves.
>
> The Board of Directors of Konsortium Lapangan Terjaya Berhad has directed me to convey to you their regret that after considerable deliberation on the matter, the Board of Konsortium Lapangan Terjaya Berhad has decided not to continue with the services of Pengurusan Projek Daya Sdn. Bhd …
>
> We are aware certain works have been rendered by yourselves, and we intend to remunerate you for any such work and services rendered to date on a quantum meruit basis …

[57] The 1st plaintiff by a letter dated 9 December 1996 (P98) stated that:

> … DAYA is not just the architect of this project, but also the architect of the Consortium itself. Therefore DAYA deems itself a partner, and veritably claims that DAYA's share of equity has already been expended since all the funds necessary towards realizing this remarkable position of only one outstanding issue

and with the Government amidst the myriads if issues that faced the Consortium since the Letter of Intent, had been funded by DAYA.

Citing *quantum meruit* is not only ethically and morally degrading but also unacceptable.

[58] Based on P8 the offer by the defendant as to the appointments of the plaintiffs was made subject to "... the signing of the appropriate contract agreement". The plaintiffs accepted the offer and had prepared the draft agreements to be negotiated. According to DW2 the appointments were conditional as the parties had not fully considered, discussed or agreed on any terms, such as scope of work construction cost etc. The work contemplated would relate substantially to the Concession Agreement and not merely the work done prior to the LOI. The conducts of the parties show that they were at ad idem that an agreement must be agreed and formalized.

[59] Sir George Jessel MR in *Crossley v. Maycock* [1874] 43 LJ 379 said:

If the agreement is made subject to certain conditions then specified or to be specified by the party making it or his solicitor, then until those conditions are accepted, there is no final agreement such as the Court will enforce.

[60] Edgar Joseph Jr SCJ further observed in *Ayer Hitam Tin Dredging Malaysia Bhd. v. YC Chin Enterprises Sdn. Bhd.* [1994] 3 CLJ 133:

True it is that merely because the parties contemplate the preparation of a formal contract that by itself will not prevent a binding contract from coming into existence before the formal contract is signed. It is not difficult to cite an anthology of cases for this proposition but we need no more than refer to *Von Hatz Feldt-Wildenburg v. Alexander* [1912] 1 Ch 284, (at pp. 288, 289) where the Court said this:

It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplates the execution of a further contract between the parties it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact

A go through. In the former case, there is no enforceable contract because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case, there is a binding contract and reference to the more formal document may be ignored.

B In *Branca v. Cobarro* [1947] KB 854, the agreement entered into by the parties contained a clause as follows:

This is a provisional agreement until a fully legalised agreement, drawn up by a solicitor and embodying all the conditions herewith stated is signed.

C It was held by the Court of Appeal that a binding agreement had come into effect.

But it is now well settled, that when an arrangement is made "subject to contract", (see *Rossdale v. Denny* [1921] 1 Ch 57) or "subject to the preparation and approval of a formal contract" (see *Winn v. Bull* [1877] 7 Ch D29) and similar expressions, it will generally be construed to mean that the parties are still in a state of negotiation and do not intend to be bound unless and until a formal contract is exchanged.

D

E **[61]** The letter of appointment clearly stipulates that the appointment is subject to the appropriate agreement to be signed by the parties and this condition was accepted by the plaintiffs as evidenced in P8 itself.

F **[62]** Following the principle in *Ayer Hitam*'s case the Court of Appeal in *Kheamhuat Holdings Sdn. Bhd. v. The Indian Association, Penang* [2006] 2 CLJ 1040 held that:

Where an arrangement is made 'subject to contract' or 'subject to the preparation and approval of a formal contract', it would be construed to mean that the parties are still negotiating and do not intend to be bound until a formal contract is exchanged. The MOU in the present case made it very clear that the MOU was subjected to a final and formal agreement between the parties.

G

H **[63]** It is clear from the correspondences between the parties, the conduct of the parties and the evidence adduced the parties were still negotiating the terms of the appointments of the plaintiffs. The appointments of the plaintiffs were subjected to a final and formal agreement between the parties. Furthermore the negotiation of the

I appointments of the plaintiffs does not in any way or manner

crystallized the oral agreement as the basis and the terms are obviously different from what is contended by the plaintiffs. The most obvious one is the agreement is between the defendant and the plaintiffs. Secondly no reference is made to the oral agreement or the success bid as contended by the plaintiffs.

[64] The plaintiffs had also submitted on *quantum meruit* but this could not be considered by the court as it is not pleaded by the plaintiffs. The plaintiffs themselves *vide* P98 had said that "... quantum meruit is not only ethically and morally degrading but also unacceptable."

[65] There is also no evidence to show that the defendant had enjoyed the benefit of all the work purportedly done by the plaintiffs. The defendant did not proceed to construct the highway based on the preliminary drawings and specifications provided by the plaintiffs.

[66] PW1 himself gave evidence that he was not sure whether the highway was constructed based on the preliminary drawings and specifications:

Q: Do you know as fact that the highway was designed according to your proposals?

A: I can't confirm.

[67] In fact the concept and the alignment of the Dedicated Highway subsequently differ and it was built based on fresh data, drawings and specifications.

Conclusion

[68] In coming to a decision in this case I have carefully considered the evidence adduced by both parties and the submissions as well authorities tendered in support of their respective cases. Based on the reasons mentioned above I am satisfied therefore that the plaintiffs have failed to prove their claim on a balance of probabilities. Accordingly the 1st plaintiff's claim against the defendant for the sum of RM14,633,196 for loss of profit and/or RM9,744,067.02 for monies expended and damages together with interest is dismissed with cost. The 2nd plaintiff's claim for the sum of RM14,633,196 for loss of profit and/or RM9,867,509 for monies expended and damages together with interest is also dismissed with cost. Cost to be taxed.